



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 476 OF 2017

HENRY MURIGI NDUNGU.....PLAINTIFF

VERSUS

WINNIE NJERI NDUNGU.....DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendant on the 9/10/17 seeking the following orders;

- a. An order directing the Land Registrar Muranga to cancel land titles for Parcels No.s Loc 7/Kaharo/1970 and 1971 and to restore the original title Number Loc 7/Kaharo/700
- b. Costs of the suit.

2. The Plaintiff's claim is based on an alleged fraud by the Defendant. It is alleged that the Defendant with intent to defraud and deceive the Plaintiff purported to file a Succession cause No. 212 of 2010 in Murang'a SPMCC Court in respect to the estate of Githinji Shadrack, now deceased. The said Githinji Shadrack was the father of both the Plaintiff and the Defendant. He was the registered owner of Loc 7/Kaharo/700.

3. According to the affidavit of service on record the Defendant though served with the summons to enter appearance on 10/10/17, did not file any appearance nor defence. The Plaintiff sought and obtained judgement in default on 18/12/17. The matter was then set down for formal proof.

4. At the formal proof hearing the Plaintiff testified that he and the Defendant are siblings, being the children of Githinji Shadrack, deceased. The said Githinji Shadrack owned the suit property. He stated that he visited the lands office and discovered that the Defendant had transferred the land to herself using forged confirmation of a grant in SPMCC No 212 of 2010, Murang'a. He stated that the succession cause does not exist. That thereafter she caused the suit land to be subdivided into to portions; Loc No.s Loc 7/Kaharo/1970 and 1971.

5. It is his evidence that the Defendant sold Parcel No No.s Loc 7/Kaharo/1970 to one Julius Kamande Mwangi. He pleaded with the Court to cancel the titles and revert the land to Githinji Shadrack so that the family can file succession.

6. PW2 – Christopher Ngatia Kinyua stated that he is the Executive Officer of the Murang'a Law Courts and the custodian of the files in the Registry. According to him, the Succession cause No. 212 of 2010 SPMCC, Murang'a referred to in this case was non-existent in his records. He presented the register of probate and administration cases in the Court for the year 2010. According to his record there were only 40 succession files registered the whole year in 2010. In the month of March there was not one single succession matter registered in the registry. He concluded that Succession cause No 212 of 2010 was not among them. That the purported succession cause did not emanate from the registry records.

7. The Plaintiff through his Advocate on record has filed written submissions which I have read and considered.

8. Section 26 of the Registration of Land Registration Act, 2012 a certificate of title is to be taken as prima facie evidence that the person named is the proprietor of the title subject to encumbrances. The title can only be challenged inter alia on grounds of fraud or misrepresentation to which the person is proved to have been a party.

9. Section 80 of the Land Registration Act provides as follows;

“(1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default”.

10. The Plaintiff particularized the acts of fraud against the Defendant as; purporting to file a Succession cause at Murang’a Law Courts SPMCC No 212 of 2010 while the same does not exist; subdividing the suit land of the deceased without filing for succession; illegally transferring the deceased land and obtaining the resultant titles.

11. The Plaintiff led evidence that his father Githinji Shadrack died on 2/8/08 and no succession has been filed. PW2, the Executive officer confirmed that the Succession Cause SPMCC No 212 of 2010 referred to does not exist from his records. The succession matters filed in the year 2010 numbered 40 in total. In the month of March 2010, no succession matters were registered in the SPMCC Court. The Title shows that it was registered in the name of Githinji Shadrack on 22/3/66. It became registered in the name of the Defendant on the 24/11/16 vide succession cause No 212 of 210 in SPMCC, Murang’a vide grant dated 16/3/10.

12. I have examined the said purported certificate of confirmation of a grant dated the 19/2/11 issued to the Defendant. Through it, Loc 7/Kaharo/700 was distributed to Julius Kamande Mwangi (0.3 acres) and the Defendant (1.7 acres). On the 7/3/2017 the title Loc 7/Kaharo/700 was subdivided into two titles to wit Loc 7/Kaharo/1970 & 1971. On the 7/3/17 and 27/5/17 two entries in the name of the Defendant were made on the title. The name of the Defendant was registered as owner twice on two different dates. No explanation was given for this. The title was eventually issued on 2/6/17 and a caution was registered on the 13/9/17 favour of the Plaintiff claiming beneficial interest.

13. In respect to Loc 7/Kaharo/1970 the title was registered in the name of the Defendant on the 22/3/17. It is not indicated whether it was vide a sale or a transmission.

14. From the analysis of the evidence adduced at the hearing it is clear that the purported confirmation of grant of administration is not genuine. It is the Courts holding that the Plaintiff has proved that the Defendant used a grant obtained through fraud to acquire the property belonging to their father. Section 45 of the Law of Succession Act provides that no person shall intermeddle with the property of a deceased person. If indeed the estate of the deceased has not been administered then the act of transferring the property to herself amounts to intermeddling with the Act and that is punishable in law.

15. I hold that the Defendant’s actions of transferring the suit property to herself without any letters of grant and/or using a forged letter of confirmation of grant amounts to fraud and intermeddling with the deceased property.

16. Having found that fraud has been proved by the Plaintiff, it is also true that a third party in the name of Julius Kamande Mwangi directly benefited from the illegalities and fraud committed by the Defendant. His name appears on the confirmed grant together with the Defendant as beneficiaries. The actions of the Defendant in transferring the land to Julius Kamande Mwangi are illegal and fraudulent which have been proved mainly on the following grounds; the Defendant did not obtain a valid or any grant of representation in respect of the suit land; the Defendant caused or subdivided the suit land into two parcels 1970 and 1971 which relates to the estate of a deceased person namely, Githinji Shadrack without a proper and/or any grant of representation or authority to do so; the Defendant by such actions of forgery and uttering false documents caused the suit land to be subdivided and registered otherwise without making provisions for the Plaintiff who is a beneficiary of the estate of the late Githinji Shadrack.

17. In view of the findings above, it is clear to the Court that acts of illegality and fraud were committed prior to and at the time at which the Defendant purported to transfer Loc 7/Kaharo/1970 to the said Julius Kamande Mwangi. The net result of this is that the said Julius Kamande Mwangi is a recipient of title tainted with fraud and illegality at all stages. The Court is aware that the said Julius Kamande Mwangi was not made a party to this case. The case was heard and concluded without the benefit of any evidence by the said Julius Kamande Mwangi. Nevertheless, the fraud and illegalities set out above became known to the Court so much so that if the Court were to close its eyes to such actions it may be tantamount to abetting and /or commission of serious crimes in land acquisition thereby downplaying the effects of Section 26 of the Land Registration Act 2012 as read together with article 40 & 67 of the Constitution. Taking everything into account, balancing the scales of justice and doing the best I can to achieve the justice of the case I consider it a lesser evil to interfere with the title issued on account of the purported parcel of land Loc 7/Kaharo/1970 to Julius Kamande Mwangi. In doing so the Court considers that the said Julius Kamande Mwangi has not been blocked from accessing the seat of justice in respect of the impugned title in so far as account is taken of the Defendant’s action proven in this case. The said Julius Kamande Mwangi most probably has a valid case against the Defendant for illegal acquisition and transfer of land at a price to him.

18. Final Orders;

- a. The Land Registrar Muranga be and is hereby ordered to forthwith cancel land titles for Parcels No.s Loc 7/Kaharo/1970 and Loc 7/Kaharo/1971 and to restore the original title Number for Loc 7/Kaharo/700 in the name of Shadrack Githinji.
- b. The Defendant to meet the cost of the suit.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 27TH DAY OF SEPTEMBER 2018

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

T M Njoroge for the Plaintiff

Defendant – N/A

Irene and Njeri, Court Assistants